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No. 622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner David H. Mitchell, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 122) is reported in 208 F. 2d 854.

JURISDICTION.

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129). An order denying a petition for rehearing was entered February 8, 1954 (R. 143). An order staying mandate was entered February 18, 1954 (R. 143). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTIONS PRESENTED.

(1) Is trial court authorized in income tax prosecution, under Federal criminal law and constitutional guarantees of Due Process, to permit an inference of unreported income to arise from Government's evidence of increase in taxpayer's assets in excess of his reported income?

(2) Does Government fail to make a Net Worth criminal case of unreported income when it offers no testimony relative to taxpayer's receipts from gifts or inheritances during tax period involved, and offers evidence as to loans only from banks in which taxpayer kept deposits; or does the defendant have the burden of establishing such receipts from gifts, inheritances and loans?

(3) In income tax prosecution by Net Worth method, is taxpayer's net worth, taken from his financial statements and based on market values $150,000 in excess of cost, ad-

missible to corroborate Government's closing Net Worth Statement, based on cost?

(4) Are the trial court's instructions correct when it computes taxpayer's income by comparing beginning net worth, based on cost, with ending net worth, based on market values $150,000 in excess of cost, and states that said purported income is evidence of willful tax evasion?

(5) Are income tax payments for twelve years prior to indictment period admissible to construct beginning net worth or for any other purpose, when Government agent testifies they have no bearing on such net worth, and when they create suspicion of tax evasion long prior to indictment period?

(6) Does Court of Appeals properly construe Rule 52(b) of Rules of Criminal Procedure when it establishes local rule of decision that failure of proof and errors in argument and instructions cannot be considered unless brought to the attention of the trial court; and, if so, what is the purpose and effect of Rule 52(b)?

(7) Does Court of Appeals properly construe Rule 52(a) of Rules of Criminal Procedure, and the controlling decisions of this Court, when it establishes local rule of decision that conviction will not be reversed for errors at trial if Court of Appeals believes guilt was established by "abundant competent proof"?

(8) Must record of trial convince appellate court that there was a miscarriage of justice and that defendant is innocent before it will reverse a conviction?

(9) Should conviction be reversed, despite defendant's failure to object at trial, when Government's closing argument includes reference to defendant's failure to testify and erroneous statement that trial court had ruled that

evidence, favorable to defendant, was "not the facts and the truth"; and when trial court instructs that testimony that disputed payments were not made is legally "negative testimony" which is "weak testimony" as compared with positive testimony of payment, and refuses to give defendant's requested instruction that negligence of third persons is a defense to criminal charge of income tax evasion?

STATEMENT.

Petitioner was convicted in the United States District Court for the Western District of Missouri on the first four counts (1945-1948), and acquitted as to the last two counts (1949-1950), of an indictment charging violations of Section 145(b) of the Internal Revenue Code, 26 U. S. C., in which it was alleged that petitioner knowingly filed false and fraudulent income tax returns for the calendar years 1945 through 1950 (R. 1-4, 79-80, 86). He was sentenced to total imprisonment of four years, and fined in the sum of $20,000 (R. 80-82); and upon appeal the judgment was affirmed by the Court of Appeals for the Eighth Circuit (R. 129). Rehearing was denied February 8, 1954 (R. 143).

Prosecution was based on two distinct theories: First—the Net Worth method of establishing income in excess of that reported in the tax returns; and Second—proof of specific items of alleged income not reported (R. 5). The Government's Net Worth conclusions appear in its Net Worth Statement (R. 9), which shows reported income during the four years for which petitioner was convicted averaging $32,000 per year, and, the Government contends, unreported income in almost the same amount. The specific omissions claimed by the Government average about $8,000 per year (R. 23-5, R. 124).

Certain items of alleged specific omissions which run through several years, including years for which petitioner was acquitted, may be disregarded. Relevant items of alleged specific omissions are (1) alleged receipts of $50 per week from taverns during 1945-8, in addition to reported income; (2) omitted rentals of $6,930 in 1945 from additional real estate; and (3) alleged receipts of $4,801.04 in 1947, representing the difference between 20% of gross receipts from the Three Bachelors Tavern and reported income, based on 10% of such receipts (R. 22-5). Receipt of the alleged $50 payments was sharply contested (R. 16-21, 41-47); proof of the alleged 20% receipts in 1947 was, at best, in balance (R. 105-6, 115-6, 51); and the omitted rentals in 1945 were admitted and explained (R. 44).

(1) Relative to Failure of Net Worth Proof.

The Government's Net Worth case as to 1949 and 1950 was met, and defendant was acquitted for said years, by proof of errors in bookkeeping and in preparation of petitioner's tax return (R. 52-55); and as to the other years, was met by proof of the bookkeeping and tax reporting system used by accountants and bookkeepers for petitioner during the relevant years, and of his lack of personal control or knowledge thereof (R. 43, 46, 48-51). In addition, petitioner contends the Government did not make a Net Worth case in that it offered no evidence relative to the source of the increases claimed by it, omitted all proof as to petitioner's gifts and inheritances during said period (R. 8-9), offered testimony of loans only from banks in which petitioner kept deposits and no proof as to loans from other sources (R. 15-16, 96, 102), and the Revenue Agents confessed complete inability to explain or identify the increases shown on Government's Net Worth Statement (R. 26-28).

(2) Relative to Use of Petitioner's Financial Statements.

In offering the Government's Net Worth proof, the Revenue Agent testified repeatedly that all assets listed in the Net Worth Statement were valued at cost, and that it would be a mistake to use market values in making such a computation (R. 8, 11, 26). In alleged corroboration of said proof, however, the Government was permitted to offer in evidence, over vigorous objection, figures as to petitioner's net worth in March, 1949, and February and October, 1950, as listed by him in financial statements given to a bank in order to obtain loans, despite testimony that such statements are made upon present market value rather than cost, and despite the direction on the face of said statements that real estate be listed "at actual market value." (R. 29-41, 11-14). Analysis of individual properties listed in the October, 1950, financial statement (R. 37, 38), as compared with the Government's Net Worth Statement for December 31, 1950 (R. 9), discloses that the former contains market values in excess of cost valuations in an amount exceeding $150,000. This appears as follows:

	Appellant's Financial Statement (R. 37, 39) (Market)	Government Net Worth Statement (R. 9) (Cost)
Oil and Gas Wells	$ 75,000.00	$ 23,699.77
1801 Holmes	18,000.00	18,531.75
1109 Broadway (1111 Broadway)	12,000.00	3,650.00
1117 Broadway	15,000.00	10,431.70
1114-16 Wyandotte	75,000.00	43,692.25
1217 Wyandotte	60,000.00*	63,225.53
1513 Main (1523 Main)	7,500.00*	6,500.00
711 West 12th St.	8,500.00	9,272.90
3732 Main	50,000.00	29,515.43
1617 Genessee	12,000.00	5,596.69
3501-09 Troost (Jewell Bldg.—R. 15)	62,557.35**	59,661.35
3114 Karnes	9,200.00**	3,446.71
405 East Armour (Richelieu Apt.—R. 15)	70,540.53**	46,412.91
Total	$475,297.88	$323,636.99

*Listed by appellant at "cost"

**Net value, after deducting mortgage to conform with Government values based on net equities (R. 15).

The trial judge instructed the jury that petitioner's income could be computed by comparing his 1945 beginning net worth (based on cost) with his 1950 ending net worth as contained in said market-value financial statements, and proceeded to compute said purported income as being approximately $60,000 a year (R. 72). This alleged income, based on unrealized market valuations, the judge compared with appellant's reported income averaging less than $40,000 a year. The trial judge concluded the comparison by stating that "there is no controversy about the financial statements," and that said comparison provides a "basis to determine whether * * * there was eva-

sion, an attempt * * * wilfully made, to defeat and evade a portion of his tax" (R. 70-72).

(3) Relative to Petitioner's Tax Payments Before Indictment Period.

Over objection, the trial court admitted in evidence a record of petitioner's income tax payments from 1933 through 1950, the payments before 1945 being admitted on the theory that they were used to construct the beginning net worth (R. 6). In ruling on the objection, the judge volunteered that, "the jury will be instructed, of course, to disregard it save only as it may relate to the net worth statement in the beginning of the period" (R. 7). The Revenue Agent subsequently testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25).

The prior tax evidence was that petitioner had paid no income taxes prior to 1940; that taxes were paid for 1940 in the amount of $57.59; for 1941, in the amount of $429.02; and that two, three, and four thousand dollars were paid for 1942, 1943, and 1944, respectively (R. 6-7). After said testimony, the Government's next witness testified that prior to 1942 the petitioner had acquired the following properties: 1941 Packard automobile, costing $1,300 (R. 11); 1941 Willys automobile, costing $600 (R. 11); Hollywood Buffet, for which he paid $2,000 in 1939 (R. 14-15); real estate at 3708 Flora, for which he paid $1,000 in 1940 (R. 15); Buckhorn Bar, for which he paid $4,000 during "the thirties" (R. 14); real estate at 15th and Belmont, for which he paid $4,100 in 1927 (R. 15); residence at 3114 Karnes, purchased for $4,500 in 1941, partly by loan and mortgage (R. 15); and Richelieu Apartments, purchaser for $71,525.26 in 1941, partly by loan and mortgage (R. 15).

(4) Relative to Improper Argument and Instructions.

In support of its claim that petitioner received $50 a week from taverns, in addition to reported income based on a percentage of gross receipts, the Government called as witnesses Ruby McIntosh and John David McIntosh, tavern operators (R. 16, 18). Mrs. McIntosh testified that she paid $50 only intermittently, and the Government was permitted to cross-examine her, under the claim of surprise (R. 16). Mr. McIntosh testified that he did not remember exactly how much he paid petitioner, and did not have $50 payments in his records, although he kept records of everything he paid him; whereupon, the Government obtained leave to cross-examine, again claiming surprise (R. 19). On Government's cross-examination, he concluded, "I must have paid, I guess. I don't know" (R. 20). Both witnesses testified their leases called for $50 as "minimum rent" (R. 18, 20); and further stated that they did not report any $50 payments as deductions on their tax returns (R. 18, 20). Petitioner did not testify at the trial; but his wife testified that she was continuously with petitioner when percentage payments were made out of gross receipts by the operators at the end of each week, and that in her presence no $50 payments were made (R. 41-47). Relative to said testimony, the Government's closing argument contained the following:

> "* * * Here were this Mr. and Mrs. McIntosh * * * They * * * started to lie to you, and started to tell you they didn't pay him this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65).

Relative to the same testimony, the trial court charged:

> "There was evidence on the part of the lessees that the $50.00 per month (*sic*) was paid * * *. There

was evidence on the part of some of the witnesses that they did not observe it was paid. That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73).

Relative to appellant's failure to testify, there was the following comment in Government's closing arguments:

> "Not one single solitary witness denied it (the alleged $50 payments which petitioner's wife denied were paid in her presence)" (R. 61).
>
> "I felt sorry for Mrs. Mitchell when she was on the stand the other day * * * here is a lawsuit where a man tries to save his own bacon by hiding behind the skirts of his own dear, little wife" (R. 62).

In commenting on testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

The Court refused (R. 65) petitioner's request for an instruction to correct the above-stated erroneous rule—that negligence of third persons would be no defense to a tax evasion prosecution—and instructed the jury generally (R. 70) on the issue of willfulness, without referring to the specific situation where, as here, the books, records, and tax returns were prepared by third persons (R. 44, 43, 46, 48-51).

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

(1) In sanctioning submission to jury of Government's Net Worth case.

(2) In sanctioning admission into evidence of petitioner's financial statements, and instructions thereon.

(3) In sanctioning admission into evidence of record of petitioner's income tax payments for twelve years prior to indictment period.

(4) In holding it could not consider erroneous instructions and argument, and failure of proof, where not brought to trial court's attention.

(5) In disregarding errors at trial, on theory competent proof was sufficient to sustain conviction.

(6) In sustaining conviction despite errors in instructions and argument.

(7) In affirming the judgment of the trial court.

REASONS FOR GRANTING THE WRIT.

(1) Conflict of Decisions and Constitutional Question Respecting Burden of Producing Evidence in Net Worth Prosecutions.

With unimportant factual differences, the legal situation here is comparable with that presented in litigation now pending before this Court, *Remmer* v. *U. S.*, No. 304, Certiorari Granted, November 16, 1953, 346 U. S. 884. In that case, the Government attempted to prove income tax evasion by the Net Worth method, comparing a Net Worth Statement prepared by Government agents for the end of

the period in question with a statement similarly prepared for the beginning of said period, and treating the net worth increase, so computed, as income. In the *Remmer* case, as stated by the Court of Appeals, the Government failed to prove the amount of cash in a safe deposit box at the beginning of the period, and thereby failed to exclude prior accumulated assets as a non-income source of the apparent net worth increase. 205 F. 2d 277, 287. In the instant case, there was *no* evidence offered relative to gifts and inheritances received by petitioner during the tax period, and the Government thereby failed to exclude those sources of non-income increase, which would account for the indicated net worth increase. Likewise, borrowed money as a source was not excluded, as the Government's evidence as to loans was not comprehensive, being limited to banks in which petitioner maintained deposits (R. 15-16, 96, 102).

In this case, as in the *Remmer* case, petitioner contends that the Government must prove unreported income by excluding non-income items, such as prior accumulations, gifts, inheritances, loans, etc. It is likewise necessary to exclude market valuations and to use cost values in making calculations, so as to exclude unrealized market value increases in computing the net worth increase which is considered to be income. See Point Two, *infra*. Many authorities rule that the Government cannot make a showing of increase in assets, and then throw upon a taxpayer in a criminal prosecution the burden of producing evidence that the increases are not income.

> "* * * The prosecution has the burden of establishing any money received as being true income." *Clawson* v. *U. S.*, (C. A. 9) 198 F. 2d 792, 794.

> "* * * the case should not have been submitted to the jury since it did not exclude the hypothesis that

the funds * * * might have been from sources other than current business income." *Bryan* v. *U. S.*, (C. A. 5) 175 F. 2d 223, 227.

"In using this net worth test to determine discrepancies in the taxpayer's return of his income, care must be taken not to charge the taxpayer with income which may be a change in form of some capital which he has owned all the time or receipts such as gifts or inheritances which do not constitute taxable income." *U. S.* v. *Williams*, (C. A. 3) 208 F. 2d 437, 438.

See:

U. S. v. *Caserta*, (C. A. 3) 199 F. 2d 905, 907.
Demetree v. *U. S.*, (C. A. 5) 207 F. 2d 892, 893-4.
U. S. v. *Fenwick*, (C. A. 7) 177 F. 2d 488.
U. S. v. *Smith*, (C. A. 3) 206 F. 2d 905, 911.

The theory behind this rule has Constitutional dignity. Mere proof of increase in assets no more justifies an inference that such increases represent income than the equally reasonable conclusion that they represent loans, gifts, or inheritances. Since there is a reasonable hypothesis consistent with the taxpayer's innocence, the presumption of innocence forbids the jury to speculate on the matter and thus requires the issue to be withdrawn from the jury. *Bryan* v. *U. S.*, *supra*; *U. S.* v. *Fenwick*, *supra*, 492. This Court has ruled that under the Due Process clause of the Fifth Amendment, in a Federal criminal trial, the Government cannot, by means of an arbitrary presumption, escape the burden of proof and cast upon the defendant the obligation of exculpation. *Tot* v. *U. S.*, 319 U. S. 463. While this decision overturned an arbitrary statutory presumption, a judge-made rule freeing the Government from proving the necessary elements of its case, and casting the burden on a defendant to disprove the same, is

even more patently intolerable. *Krulewitch* v. *U. S.*, 336 U. S. 440, 456-8; *Morissette* v. *U. S.*, 342 U. S. 246, 275.

In Net Worth prosecutions, there exists a contrary line of authority, recently criticized by Chief Judge Hutcheson when he stated that some courts have been "more concerned with easing the difficulties attending the proof of guilt by (the Net Worth) method than with preserving unimpaired the constitutional rights of a defendant * * *" *Demetree* v. *U. S.*, *supra*, 894. While that opinion refrains from citing criticized decisions of other courts, the adverse comment clearly applies to the controlling decision in the Eighth Circuit, where the Court permitted the jury to convict a taxpayer although stating, "The evidence of the government does not exclude the possibility that the defendant had some substantial accumulation of capital (at the beginning of the tax period, or that he acquired during the period) a large amount of capital out of which he made the loans, investments and expenditures which the government contends reflect income." *Schuermann* v. *U. S.*, (C. A. 8) 174 F. 2d 397, 399. In other words, no proof was made that the increases were income. While the Court attempted to rationalize the decision by stating the untenable proposition that proof of increased assets "will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return," the burden of the Court's remarks shows that the inference is primarily a rule of convenience to aid the prosecution. l. c. 399. The most extensively-considered authority contrary to the *Bryan-Fenwick* decisions, *supra*, is *Bell* v. *U. S.*, (C. A. 4) 185 F. 2d 302; but even in that case there was proof, contrary to the situation here, that the defendant had not received gifts or inheritances during the tax period. l. c. 307.

In considering whether the inference of income drawn from mere proof of increased assets is founded in reason or is an arbitrary guess, doing violence to the presumption of innocence, it is apparent that the only reason to prefer the possibility of income over the possibility of gifts, loans, inheritances, etc., is the loose, lay-reasoning that a person charged with crime is likely to come forth with proof of his innocence, if it exists and he is in possession of the same. Such reasoning, however, is forbidden in a criminal trial. As stated in the opinion of this Court, by Mr. Justice Roberts:

> "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all facts essential to guilt. This is not permissible." *Tot* v. U. S., 319 U. S. 463, 469.

The Court may note that, while this question was presented to the Court of Appeals (R. 119), that Court held it was disabled from considering the same because it had not been presented to the trial court (R. 127). This was completely erroneous, since the trial court could not grant proper relief, being bound by the decision of the Court of Appeals in the *Schuermann* case, *supra*. It would have been worse than useless to request relief at the trial level, since petitioner would have been urging the trial judge to commit error, under the rule presently controlling him. Moreover, it is settled that a failure of proof should be corrected by an appellate court, even though not noted below, since

there can be no plainer or more substantial error than a failure of proof. *U. S.* v. *Norton*, (C. A. 2) 179 F. 2d 527; *U. S.* v. *Renee Ice Cream Co.*, (C. A. 3) 160 F. 2d 353; *Strickland* v. *U. S.*, (C. A. 5) 155 F. 2d 167. See Point Five, *infra*. The case was submitted to the jury on two theories, one of which was not made; and the judgment must be reversed, because on such a record the Court cannot know but what petitioner's conviction rested on the case not made. *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5; *Shelton* v. *U. S.*, (C. A. D. C.) 165 F. 2d 241, 244-5; see *Kotteakos* v. *U. S.*, 328 U. S. 750, 765; Point Four, *infra*. This must be particularly true where, as here, the failure of proof affected the principal theory. As noted in the Statement, page 4, the alternative (specific omissions) theory involved relatively small amounts of money.

Having granted certiorari in the *Remmer* case, *supra*, where a similar question exists, and with the plain failure of proof in the instant case now before the Court, petitioner respectfully submits that the time is ripe for a solution to the conflict between the appellate courts on the burden of proof in Net Worth prosecutions, wherein conviction now depends upon the accident of residence; and further submits that the principles of the *Tot* case, *supra*, be applied to all criminal cases, without special advantages being granted to the prosecution of income tax charges.

(2) Erroneous Admission into Evidence and Instruction upon Petitioner's Financial Statements.

Petitioner presents herewith a strikingly erroneous misuse of purported evidence, preventing a fair trial, and likely to recur when income is computed by the Net Worth method. As previously noted, Net Worth calculations of income require that the Net Worth statements so used be

prepared on cost valuations, so as to exclude from such calculations market value increases which are not income until realized. The Government agent testified to this fact (R. 8, 9, 11, 26), and it is a well established rule in Net Worth prosecutions. Schwerdtfeger, "Federal Prosecutions of Income Tax Cases," 40 Ky. L. J. 400, 404, n. 10. "Enrichment through increase in value of capital investments is not income in any proper meaning of the term." *Eisner* v. *Macomber*, 252 U. S. 189, 214-15.

Notwithstanding the settled basic requirement of valuation at cost in a prosecution of this character, the Government supported its Net Worth theory with evidence which directly conflicted with the cost premise, and the trial judge departed therefrom by attempting to calculate petitioner's income by comparing Government's beginning net worth, based on cost, with a closing net worth, based on market values containing at least $150,000 increase over the cost basis. The jury was misled and confused by said evidence into erroneously treating as taxable income mere unrealized increases in value of assets held—not sold or in any manner transferred—and into convicting petitioner for failing to report as income such increases which were not income.

In his Statement herein, page 7, petitioner has compiled a tabulation showing the extent of increased market values over cost, as contained in petitioner's financial statement of October, 1950, two months before the end of the six year period involved in this trial. The same tabulation was presented below (R. 121) and is unchallenged; but the opinion of the Court of Appeals erroneously stated, "there was no evidence that the (financial) statements included any increase in value as distinguished from income" (R. 126). Likewise, although petitioner twice objected to comparison of a Government's cost-value Net

Worth Statement with petitioner's financial statements, based on market values, the trial judge overruled the objections, and calculated purported income by means of such erroneous comparison (R. 12-14, 30, 72). The objections made to the evidence fully preserved petitioner's right to challenge the instructions. *U. S.* v. *Kelinson*, (C. A. 2) 205 F. 2d 600, 601. Only this Court can prevent petitioner's conviction, arrived at by the flagrantly erroneous method of treating $150,000 in market value increases as unreported income.

The error here complained of was expressly conveyed to the jury in the trial judge's instruction, wherein he deducted the (cost) net worth at the beginning of the period from the (market value) net worth at the end of the period, computed petitioner's income as being approximately $60,000 a year (R. 72), compared same with petitioner's reported income averaging some $35,000 a year (R. 71-72), emphasized that these calculations were based on petitioner's own financial statements concerning which "there is no controversy," and specifically urged the jury to consider said facts on the question of willful evasion (R. 72). It should be further noted that the $150,000 increase in market values over cost, ascertainable from said financial statements, fully explains the unreported increase of $25,000 a year, as computed above, and marks the difference between evidence supporting the Government's case and evidence supporting petitioner. See further calculation in petition for rehearing (R. 133).

The highly prejudicial error herein discussed cannot be passed over with the slighting comment that the same "could not be prejudicial" (R. 126) because there was sufficient proof, other than that here challenged, to present a question for the jury. Point Four, *infra*. Judgment should be reversed, to preserve petitioner's right to a fair trial, and

to prevent further misuse of market value financial statements in Net Worth computations of income.

(3) Erroneous Admission into Evidence of Petitioner's Prior Tax Payments.

Petitioner presents herewith erroneously-admitted evidence creating improper suspicion of tax evasion in years long prior to the period for which petitioner was indicted, preventing a fair trial, and likely to recur in prosecutions of this nature. Over objection, testimony was admitted in evidence that petitioner paid no income taxes for the years 1933-1939, that he paid only $57.59 for 1940 and $429.02 for 1941, and that he paid more substantial taxes, amounting to two, three and four thousand dollars for 1942, 1943, and 1944, respectively (R. 6-7). Immediately after this testimony, there was testimony that prior to 1942 petitioner had acquired two automobiles, including a Packard; two taverns, costing $6,000; miscellaneous real estate costing $9,600; and a $70,000 apartment building, purchased in May, 1941, partly by loan and mortgage (R. 11, 14, 15). No comment need be made to establish the prejudicial nature in an income tax prosecution of such evidence, showing large acquisitions of property by a defendant who paid little or no taxes. The legal impropriety of such prejudicial matter relating to years long prior to the indictment period is well settled. *Wolcher* v. *U. S.*, (C. A. 9) 200 F. 2d 493, 497; *Boyer* v. *U. S.*, (C. A. D. C.) 132 F. 2d 12, 13.

The Government's purported justification for offering said prior tax payments in evidence was that they could be used to construct the beginning net worth (R. 6). Subsequently, the Government's Revenue Agent disavowed and disapproved the above justification, when he testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25). On the

present record, no justification has been offered, nor can be offered, for the admission of this highly prejudicial matter.

In reviewing this objection (R. 127), the Court of Appeals demonstrated the recurring nature of this type of alleged proof in Net Worth prosecutions, by relying on three recent decisions in the Eighth Circuit, alone. *Leeby* v. *U. S.*, 192 F. 2d 331; *Hanson* v. *U. S.*, 186 F. 2d 61; *Schuermann* v. *U. S.*, 174 F. 2d 397. Petitioner does not argue with the holding in the *Hanson* case, *supra*, where defendant's failure to pay taxes in prior years was admitted in rebuttal to his contention that he had accumulated extensive assets prior to the tax period involved. l. c. 66. In the instant case, the occasion for such rebuttal never arose, since petitioner during trial agreed with the Government as to his beginning net worth (R. 14). The *Schuermann* case, *supra*, is not in point, because there was no prejudice from the introduction of the prior tax returns, there being no testimony of accumulated assets during said period. l. c. 399. In *Leeby* v. *U. S.*, *supra*, the evidence of nontaxable returns (l. c. 333) was admissible to rebut the disputed evidence by defendant that he had accumulated substantial assets during said years (l. c. 332); and petitioner need not argue with the result of that case. The Court there stated in dictum that the prior returns would have some bearing on defendant's intent (l. c. 334), but this dictum is inconsistent with the trial court's instructions in that case which were favorably quoted, to the effect that the defendant's prior returns are presumed to be in compliance with the law, and that there is no charge of evasion during said years. l. c. 333. The question of fraudulent intent cannot sustain the introduction of such evidence in the instant case, since there is a break of four years between the last year for which returns are suspiciously small and

the first year of the indictment. This break is too long to support use of said evidence on the question of intent, even assuming that prior returns are sometimes admissible on said theory. *Wolcher* v. *U. S.*, *supra*, *Boyer* v. *U. S.*, *supra*.

One statement in the *Leeby* case, *supra*, should be considered. That is the statement, quoted in the present opinion (R. 127), that, "In estimating defendant's income * * * on the net worth basis, the witness considered the question of his income or want of income prior to 1944 and we think the testimony was admissible for that purpose * * *." l. c. 333. This vague statement finds no support in the Court's reasoning, and appears to be a conclusion on a question of accounting, induced by the opinion of the Government's "expert witness," or by counsel's interpretation thereof. In the present case, this erroneous statement is clearly answered by the Government's witness who testified that the prior tax payments had no bearing on beginning net worth (R. 25). The Court's erroneous statement in the *Leeby* case, *supra*, should be corrected on the basis of the present record, so that the Government will not have a meaningless pretext for introducing prejudicial evidence into all Net Worth prosecutions. For this reason, judgment should be reversed.

(4) Erroneous Application of Harmless Error Rule.

Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The leading authorities interpreting and applying this "harmless error" rule likewise date from 1946. *Bollenbach* v. *U. S.*, 326 U. S. 607; *Bihn* v. *U. S.*, 328 U. S. 633; *Kotteakos* v. *U. S.*, 328 U. S. 750. This Court recently stated the harmless error rule in the following

cautious language: "Where it is made to appear affirmatively * * * that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials." *Brown* v. *Allen*, 344 U. S. 443, 460. The Court of Appeals for the Eighth Circuit, however, has made sweeping use of the harmless error rule in the instant case, in violation of the above authorities, and of petitioner's right to a fair, substantially unprejudiced trial.

The most that can be said for the Government's side of this case is that "the scales were quite evenly balanced"; certainly fair analysis would not reveal an "open and shut" case. *Bihn* v. *U. S.*, *supra*, 638. See Statement, pages 4-6 herein. The acquittal as to two years (R. 80) indicates the jury was in some doubt. *U. S.* v. *Wicoff*, (C. A. 7) 187 F. 2d 886, 891. Since petitioner is not relying on mere formalities or technicalities, the burden of establishing an overwhelming case such as would override the errors is upon the Government. *Kotteakos*, *supra*, 760. This Court has clearly advised the courts of appeal that the Government cannot escape reversals for substantial errors by claiming that there was proof, apart from the errors, which would support a conviction. *Bollenbach*, *supra*, 614; *Kotteakos*, *supra*, 765. "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government." *Bihn* v. *U. S.*, *supra*, 638-9. "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty * * * it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused,

however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *U. S.*, *supra*, 615. See *Meeks* v. *U. S.*, (C. A. 9) 163 F. 2d 598, 602.

Despite the above guiding rules, the Court of Appeals departed completely from said standards in ruling that the improper admission and use of appellant's financial statements (Point Two, *supra*) "could not be prejudicial" because "there was abundant competent proof aside from these questioned exhibits" to support the conviction (R. 126). In addition, the Court confused the bare minimum of evidence sufficient to prevent a directed verdict with the overwhelming evidence necessary to override substantial error. This clear distinction, commented upon by Judge Frank in his dissenting opinions in *U. S.* v. *Rubenstein*, 151 F. 2d 915, 921-2, and *U. S.* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 650, was forgotten by the Court when it seized upon petitioner's quite proper failure under the circumstances to move for a directed verdict as an element in finding the errors at trial to be harmless (R. 126-7).

The errors complained of, and their substantiality, are discussed at length under petitioner's Points One, Two, Three, and Six, and will not be repeated under this topic. Petitioner concludes that the errors are substantial, prejudicial, and destructive of his right to a fair trial, that the harmless error rule cannot properly give appellate courts pause in reversing this conviction, and that the clear misconstruction of Rule 52(a) by the Court below should be corrected by this Court.

(5) Conflict of Decisions and Erroneous Application of Plain Error Rule.

Rule 52(b), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Despite this controlling rule of procedure, the Court of Appeals for the Eighth Circuit has ruled that it cannot consider the sufficiency of the evidence to sustain the conviction unless raised below (R. 127); and, likewise, that erroneous instructions and arguments to the jury will not be considered unless "objections were made or exceptions saved" in the trial court (R. 128). These rulings are now the settled law of said Circuit under recently decided cases: *Leeby* v. *U. S.*, *supra*; *Finnegan* v. *U. S.*, 204 F. 2d 105; *Myres* v. *U. S.*, 174 F. 2d 329, 339.

Except for incidental quotation in a case involving Rule 52(a) (*Echert* v. *U. S.*, 188 F. 2d 336, 341), Rule 52(b), permitting plain error to be noticed and corrected, though not raised below, has not even been honored by citation by the Court of Appeals for the Eighth Circuit. 2 Shepard's Federal Reporter Citation 2128; Supplement, January, 1954, 347, tabulating citations of Rule 52(b) by this Court and the other Federal Courts, reveals that since its adoption in 1946, the Rule has been cited in fifty decisions. This Court and all courts of appeal except those for the Fourth, Sixth, and Eighth Circuits, have applied the Rule. It is apparent that, if the Rule gives appellate courts a measure of discretion, the courts of appeal have been using widely varying standards of discretion, and that the latter courts (C. A. 4, C. A. 6 and C. A. 8) have been applying standards which effectively abolish the Rule. Petitioner urges this Court to use this case as an appropriate method

for bringing an end to such illegal and inharmonious standards.

In his petition for rehearing, petitioner cited decisions of this Court and the courts of appeal from all but the Fourth, Sixth, and Eighth Circuits, in which, contrary to the announced rule in the Eighth Circuit, consideration was given to alleged errors in instructions and argument, though no objection was made thereto at trial (R. 139-140). The Court refused a rehearing (R. 143), thereby refusing to join harmoniously with this Court and the other eight circuits.

In the instant case, the Court of Appeals for the Eighth Circuit gave its initial express consideration to Rule 52(b); and adopted a limitation from the Fourth Circuit (which has never cited the Rule) which effectively destroys the Rule. The Eighth Circuit adopted the following language, "We exercise the power to notice plain error not assigned (*sic*) only where necessary to prevent a miscarriage of justice * * *'" (R. 129). In paraphrasing Rule 52(b), said Court likewise added the qualification that the error, to be considered though not presented to the trial court, must be "plain error affecting substantial rights *and resulting in a miscarriage of justice*" (R. 129), the words italicized by us not being contained in the Rule. Thus, unless convinced of an appellant's innocence—an unusual situation, surely, after indictment, trial and conviction by a jury—the Court of Appeals for the Eighth Circuit will refuse to consider the error. The area of discretion is thereby severely limited in a manner which mocks the Rule.

In considering the evidence apart from the errors relied upon, and in refusing to consider the nature of said errors, the Eighth Circuit failed to note that the only issue under Rule 52(b)—distinguishing it from Rule 52(a)—is

whether the errors relied upon but not raised below are "plain" errors; i. e., whether such errors are clear, or too obscure for the trial court to understand and recognize, without being told. Rule 52(a), (b), 18 U. S. C. Where the error is "plain," the trial court's responsibilities for fair conduct of the trial do not cease merely because no objection is heard. The situation is not uncommon when "the trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck* v. *U. S.*, 318 U. S. 236, 248.

The issue under Rule 52(b) is whether the errors complained of are "plain"; this requires consideration of the nature of the specific errors urged upon the appellate court. In direct opposition to the practice indicated by the Rule, the Court below refused to look at the cited points of error in argument and instructions, and directed its attention toward all matters in the Record *except* the errors cited (R. 128-129). Then, acting as a jury and concluding that guilt "was established beyond a reasonable doubt by substantial competent evidence" (R. 129), the Court brushed aside eight of the eleven issues presented in petitioner's brief (Points I(b), I(c), II, IV(b), IV(c), V(a), V(b), V(c)—R. 119-120). The seriousness and substantiality of the erroneous instructions on petitioner's financial statements, and the failure of proof as to the Net Worth method have already been indicated (Points One, Two, *supra*). The other matters are briefly stated under Point Six, *infra*. For the procedural error of the Court of Appeals in refusing to consider the nature of the cited errors, and because of the plainness and substantiality of those errors, as discussed elsewhere, the judgment should be reversed.

(6) Erroneous Instructions and Argument.

Relative to the sharply disputed evidence as to petitioner's alleged receipt of payments of $50 a week from taverns, in addition to reported income of a percentage of gross receipts (R. 16-21, 41, 47), and to Government's cross-examination of the tavern operators on the claimed theory of "surprise" (R. 16, 19), the Government's closing argument erroneously and prejudicially contained the following: "Here were this Mr. and Mrs. McIntosh * * *. They * * * started to lie to you, and started to tell you they didn't pay this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65). The argument as to the theory on which the trial court allowed cross examination attributed to the trial judge the position of invading the province of the jury. *McNutt* v. *U. S.*, (C. A. 8) 267 Fed. 670, 673. Such an emphatic conclusive statement, if made by the judge, would be reversible error even though he also stated that the jury is the ultimate trier of the facts. *Quercia* v. *U. S.*, 289 U. S. 466; *Cook* v. *U. S.*, (C. A. 8) 14 F. 2d 833. The jury was justified from these comments, acquiesced in by the trial judge, to conclude that during the course of the trial a final decision had been made by the judge that "the facts and the truth" were that said payments had been made.

Supporting the above erroneous and prejudicial concept, the trial judge instructed that Mrs. Mitchell's testimony that such payments were not made in her presence, and that she was always present when profits were divided between petitioner and the operators (R. 41-47) "is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73). This

instruction on "negative testimony," without precedent in any reported Federal criminal trial, was clearly erroneous. *State* v. *Davies*, 101 Ohio St. 487, 129 N. E. 590. Even in a civil case, the instruction was improper, on the facts herein. 42 Harvard Law Review 422, 425; 2 Wigmore on Evidence (3rd Ed.), Sec. 664, pages 781-2; *U. P. R. Co.* v. *Burnham*, (C. A. 10) 124 F. 2d 500, 502; *Eiseman* v. *Penn. R. Co.*, (C. A. 3) 151 F. 2d 222. Under no circumstances should instructions on negative evidence, as artificially light-weight testimony, be permitted in criminal trials in Federal Courts. 2 Thompson on Trials, Sec. 2417, pp. 1763-4.

In view of the testimony by Mrs. Mitchell that the alleged $50 payments were not made in her presence, the Government's argument that, "Not one single solitary witness denied it" (R. 61) must be taken as a reference to the possibility that payments were made to petitioner secretly, out of his wife's presence. As such, and since petitioner did not testify, it was an illegal reference to his failure to testify. *Barnes* v. *U. S.*, (C. A. 8) 8 F. 2d 832, 834. Another such illegal reference is contained in the argument that, by having his wife testify, petitioner was "hiding behind the skirts of his own, dear little wife" (R. 62). This is reversible error. *Wilson* v. *U. S.*, 149 U. S. 60; *DeMayo* v. *U. S.*, (C. A. 8) 32 F. 2d 472, 475.

In commenting upon testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

This argument makes petitioner criminally liable for the negligence of his agents, and was clearly erroneous. *Lurding* v. *U. S.*, (C. A. 6) 179 F. 2d 419, 421. A considerable portion of defendant's evidence concerned itself with the fact that petitioner did not personally control or have knowledge of his bookkeeping and tax-reporting system (R. 43, 46, 48-51). In view of said testimony, and the aforesaid improper argument, it was reversible error for the trial court to reject petitioner's suggested instruction (R. 65), correcting said argument and informing the jury of the law applicable to said defense. *Lurding* v. *U. S.*, *supra*.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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March, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 622

DAVID H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 122-129)[1] is reported at 208 F. 2d 854.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129-130), and a petition

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[1] References to the printed record will be designated, "R". References to the reporter's transcript of the evidence, which has been certified to this Court, will be designated "Tr.", and the page numbers used will be the red numbers at the top of each page.

for rehearing was denied February 8, 1954 (R. 143). The petition for a writ of certiorari was filed March 5, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence supporting the Government's net worth computation, the sufficiency of which was not challenged in the trial court, was sufficient to prove wilful attempted evasion of income taxes.

2. Whether the trial court erred in permitting the jury to consider three financial statements prepared by the petitioner in 1949 and 1950 in which some of the assets were valued at the market instead of at cost.

3. Whether the trial court erred in permitting the Government to introduce evidence of income taxes paid by petitioner in previous years in order to reconstruct his net worth at the starting point of the computation.

4. Whether such grave errors were committed in the prosecutor's argument and in the trial judge's charge as to require the Court of Appeals to exercise its discretion to notice plain error in the absence of a trial objection.

STATUTE AND RULES INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(b) *Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1946 ed., Sec. 145.)

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to

adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On May 8, 1952, a six-count indictment was filed against petitioner in the United States District Court for the Western District of Missouri charging him with wilful attempts to evade and defeat his income taxes for the years 1945 through 1950 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code. (R. 1-4.)

The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1945)	$18,297.52	$ 5,882.69	$77,221.17	$48,650.70
Count II (1946)	44,836.04	20,612.03	57,240.11	29,212.58
Count III (1947)	22,716.92	7,810.41	69,186.82	38,670.42
Count IV (1948)	43,615.47	13,927.94	67,039.89	26,462.02
Count V (1949)	44,139.16	14,186.00	61,412.51	23,218.77
Count VI (1950)	42,954.37	14,075.24	68,358.14	28,153.24

After a jury trial lasting seven days petitioner was found guilty on the first four counts and not guilty on the last two. (R. 79-80, 85-86.) On September 23, 1952, concurrent sentences of imprisonment for four years were imposed under each of the first three counts, and petitioner was fined $10,000 on the first count and $5,000 on both the second and third counts, a total of four years' imprisonment and $20,000 in fines. Imposition of sentence was suspended as to the fourth count and petitioner was placed on probation for five years, beginning with his release from prison and conditioned on settlement or compromise of his tax liabilities. (R. 80-82.) The Court of Appeals affirmed. (R. 122-130.)

The evidence to support the verdict may be summarized as follows:

During the years involved in this case, petitioner owned or acquired interests in a number of taverns and bars. (R. 9, 97-99.) Some of these he leased

to operators under agreements whereby he was to receive either 10% or 20% of the gross receipts plus $50 a week rental. (R. 16-21, 105-108.) Each Saturday night petitioner and his wife visited the various locations, opened the cash register and read the total receipts for the week, subtracted the expenses (which had been paid out of the register by the operator), divided the profit with the operator, and reset the register for the following week. Petitioner's wife would record the total receipts and expenses in a day book kept at the location. (R. 41-47, 111-113.)

Petitioner also owned or acquired large interests in real estate (R. 9, 15, 99-102), equities in several oil wells, and a small amount of stocks and bonds (R. 9). He reported gambling winnings for one year. (R. 102-103.)

During the investigation of petitioner's returns for the years involved, Internal Revenue Agents had numerous conversations with him concerning his income and his assets. (R. 102-103; Tr. 96, 102, 109, 117, 120, 123, 127, 150, 153, 158, 162, 175, 229, 412, 416-417, 474-478, 487, 498-499.) They talked to over a hundred persons with whom petitioner had had business dealings. (Tr. 46-50.) They discovered that he had purchased over a thousand cashier's checks in amounts varying from $10 to $40,000. (Tr. 58-59.) And they were unable to trace the source of large amounts of cash which he had used to pay for various real estate acquisi-

tions. (Tr. 161-187.) For instance, of $45,000 used to purchase the Rasbach Hotel in 1945, the agents were unable to trace the source of $27,000 (Tr. 161-164), and they were unable to trace any of approximately $18,500 used to purchase another property in 1947 (Tr. 176-178).

In view of the fact that petitioner had virtually no records for 1945, 1946 and 1947, very few records for 1948, and incomplete records for 1949 and 1950, the Government presented proof of his correct net taxable income for all these years by computing the annual increases in his net worth and adding thereto his proven non-deductible annual expenditures. (R. 8-9, 55.) There was no dispute as to petitioner's net worth at the starting point, December 31, 1944. Counsel stipulated that it was $146,924.41 (R. 9-14.) Nor was there any dispute as to the ownership or valuation of the items included in the Government's computation. All items included therein were valued, not at market value, but at the original cost to petitioner. (R. 11.) In fact, the Government did not use the inflated values which petitioner had ascribed to some of these properties in his returns.[2] The Government included only those expenditures which could be verified, and the net worth computation, therefore, shows a smaller increase in assets than it would

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[2] He appears to have used market value in his returns, thus permitting him to claim considerably larger depreciation deductions. (Tr. 95-98, 111-112, 476, 741-742.)

have had petitioner's own figures been used. (R. 97-99; Tr. 111-112.) The computation revealed the following as to petitioner's net income (R. 9):

Year	*Reported*	*Corrected*	*Unreported*
1945	$18,297.52	$59,937.67	$41,640.15
1946	44,836.04	64,343.44	19,507.40
1947	22,716.92	64,716.40	41,999.48
1948	43,615.47	65,778.37	22,162.90
1949	44,139.16	61,132.73	16,993.57
1950	42,954.37	68,817.05	25,862.68

During the year 1945 petitioner sold none of the assets which he admittedly had at the starting point date, his cash on hand increased over $30,000, and he spent over $50,000 in acquiring two properties. Yet he reported taxable income of only $18,297.52. During the year 1947 petitioner spent approximately $68,000 in the acquisition of two new properties and reported taxable income of only $22,716.92. The difference cannot be accounted for by sale of other properties or use of cash on hand. (R. 9; Tr. 214-215.)

In addition to the net worth computation the Government proved substantial specific items of taxable income which had been received by petitioner but not reported in his returns. The $50 weekly rent received from the tavern operators had not been reported, and rentals received from certain other properties had also been omitted. (R. 22-25, 103, 108-109.) A large part of the Government's case was devoted to these specific items (Tr. 218-390), and the prosecutor opened his argument

to the jury by recapitulating this evidence (Tr. 729-737). The totals of the unreported items for the years still involved in the case are (R. 108-109):

1945	$14,859.96
1946	5,485.00
1947	9,217.52
1948	3,484.00

The Revenue Agent who had conducted the investigation stated that he did not know the source of the additional income shown by the net worth computation over and above these specific items. (R. 26-27.)

Petitioner did not take the stand himself. The defense sought to counter the Government's specific items of proof by denying receipt of some of these items and explaining the failure to report others. The defense also sought to explain the additional unreported income shown by the Government's net worth computation as the unintended result of petitioner's inadequate bookkeeping system.

Petitioner's wife testified that she had accompanied him on his weekly rounds of the taverns, that she had never seen him receive the $50 rental from any of the operators, and that she had omitted certain other income from his returns through oversight. (R. 41-47, 111-113.) Receipt of one other specific item amounting to approximate-

ly $4,800 was also challenged. (R. 51, 105-106, 115-116.)

The essence of the defense was that the Government had failed to prove that petitioner had wilfully failed to report all of his taxable income, that his "homespun" bookkeeping system had been inadequate for his greatly increased assets, and that the large omissions shown by the Government's net worth computation could be accounted for by the errors of his bookkeepers and accountants. (Tr. 510, 514, 517.) Nelson, a certified public accountant, testified that he had analyzed petitioner's books for 1949 and 1950, during which two years the books were fairly complete. His analysis showed that petitioner had actually received taxable income closely approximating that shown by the Government's computation. Nelson testified that the failure to report this income was attributable to the errors of the bookkeepers. (R. 52-56.) The defense asked the jury to assume that similar errors accounted for the omissions in 1945, 1946, 1947 and 1948, for which years Nelson was unable to make an analysis because of lack of records. (R. 55; Tr. 517, 760-763.)

The sufficiency of the Government's case was not challenged by a motion for a judgment of acquittal, either at the close of the Government's case or at the close of all the evidence. (Tr. 508, 727.)

ARGUMENT

1. Petitioner contends (Pet. 2, 11-16) that the Government failed to prove unreported taxable income by its net worth computation because it failed to exclude the *possibility* that the increases could have come from gifts, loans or inheritances. He argues that, although he failed to raise this point in the trial court, there is an essential failure of proof constituting plain and substantial error which should have been noted by the Court of Appeals. And, despite the fact that the Government also relied on proof of substantial specific items of unreported income (the sufficiency of which is not challenged), he urges that the conviction should be reversed because the jury may have relied upon the Government's net worth proof.

There can be no doubt that the Court of Appeals may, in its discretion, notice the clear failure of the Government to prove an essential element of its case, even in the absence of proper objection in the trial court. But petitioner was hardly in a position to invoke the exercise of that discretion in this case. Although the defense was clearly aware of the significance of loans, gifts or inheritances (Tr. 407-410), there was no suggestion at any time during the trial that the unreported income was traceable to such non-taxable sources. Instead, the defense frankly admitted failures to report taxable income and sought to explain them

as bookkeeping errors. (See *supra*, pp. 9, 10, and Tr. 769-772.) After claiming innocent failure in the trial court, petitioner cannot turn around on appeal and claim that there was no failure at all.

Furthermore, even apart from these admissions by the defense, there was no deficiency in the Government's net worth proof. Concededly the burden rested upon the Government to establish that the increases came from current taxable income. In this case, it is true, the Government did not exclude the *possibility* that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence. In order to establish a *prima facie* case the Government had to present evidence which could convince a reasonable mind that the only reasonable *probability* was that a substantial portion of the increases was attributable to unreported taxable income.[8] The test on appeal of the sufficiency of the Government's evidence is whether reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had wilfully failed to report substantial portions of his taxable income. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80;

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[8] The Government was not, of course, required to prove the exact amount of unreported income. *United States* v. *Johnson*, 319 U. S. 503, 517.

Gorin v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251-252; *Stilson* v. *United States*, 250 U. S. 583, 588-589; *Curley* v. *United States*, 160 F. 2d 229, 232-233 (C.A.D.C.), certiorari denied, 331 U. S. 837; *Gendelman* v. United States, 191 F. 2d 993, 995 (C.A. 9th), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States*, 183 F. 2d 391 (C.A. 9th), certiorari denied, 340 U. S. 864. The cases upon which petitioner relies,[4] in which the jury had been permitted to draw an arbitrary inference from the facts proved, are not here in point.

Judged by the above test, the Government's net worth proof was sufficient to take the case to the jury. The computation showed unexplained increases in petitioner's net worth ranging from $17,000 to $42,000 for each of the six years involved in the investigation. But the Government's case did not rest, as petitioner asserts (Pet. 13), upon "mere proof of increase in assets." The Government proved definite sources of income, specific items of unreported income, and an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth. Information as to the existence of unknown or secret gifts was peculiarly within the knowledge and control of the petitioner and could easily have been presented by him. To

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[4] See *Tot* v. *United States*, 319 U. S. 463; *Morissette* v. *United States*, 342 U. S. 246.

prevail on this ground the defendant should be required at least to put in issue at the trial the receipt of specific gifts. In the circumstances of this case, where no such effort was even suggested at the trial, the jury could reasonably infer that the increases were not attributable to non-taxable sources. This Court has said (*Rossi* v. *United States*, 289 U. S. 89, 91-92):[5]

> The general principle * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.

Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[6] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[7] it may also give weight to the failure of an accused taxpayer to produce evidence of non-taxable sources of income in explanation of large increases in his net worth discovered

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[5] See also *United States* v. *Fleischman*, 339 U. S. 349, 360-364; *Morrison* v. *California*, 291 U. S. 82, 88-91; *Casey* v. *United States*, 276 U. S. 413, 418.

[6] *Wilson* v. *United States*, 162 U. S. 613, 619.

[7] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.).

[8] *Bell* v. *United States*, 185 F. 2d 302, 309 (C.A. 4th), certiorari denied, 340 U. S. 930; *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C.A. 8th), certiorari denied, 338 U. S. 831.

by the investigating agents.[8] The force of a *prima facie* case may not be defeated by "skilful concealment" (*United States* v. *Johnson*, 319 U. S. 503, 517-518), or by mere conjecture and speculation as to the possible existence of non-taxable sources (*Banks* v. *United States*, 204 F. 2d 666, 672, (C.A. 8th), certiorari denied, 346 U. S. 857). Here, where the probative force of the Government's evidence has the support of both courts below and of the jury, there is no occasion for further review by this Court. *United States* v. *Johnson*, *supra*, p. 518.

There is no conflict on this point with the two cases on which petitioner so heavily relies (Pet. 12-14), *Bryan* v. *United States*, 175 F. 2d 223 (C.A. 5th),[8] and *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7th). In each of these cases there was an incomplete investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226, and 177 F. 2d at 491. But here there was no comparable defect; the jury could properly infer, as it did, that the large increases in net worth uncovered by the agents, which petitioner at no time claimed were derived from non-taxable sources, actually represented current income.

2/ Petitioner contends (Pet. 2-3, 11, 16-19) that it was prejudicial error to permit the jury to consider the three financial statements which he pre-

[8] Affirmed on another ground, 338 U. S. 552.

pared in 1949 and 1950, for the reason that the assets therein were valued, not at cost, but at the market. The argument is without merit.

The three statements were submitted at the very end of the Government's case in corroboration of the completed net worth computation, and it was made clear that market values were used in them. (R. 29-41.) On the other hand, it was repeatedly impressed upon the jury, both by the prosecution and by the defense, that the Government's net worth computation, in order to present a true picture of petitioner's income, must necessarily value his assets at cost. (R. 11-15, 97-102; Tr. 78, 85-86, 101, 105, 115, 119, 122, 126, 129, 169, 402-403, 415-416, 740, 774-775.) The absence of any prejudice is demonstrated by the fact that petitioner was acquitted on the counts covering the years 1949 and 1950 in which the financial statements were prepared. The net worth computation, the results of which petitioner did not challenge but only sought to explain at the trial, provided ample evidence of unreported income exclusive of the financial statements, and it bore out the judge's remark to the jury that the evidence indicated petitioner had a net income of approximately $60,000 a year. (Cf. R. 9 and 71-72.) The calculation upon which petitioner now relies (Pet. 18) is fallacious in that it fails to take into consideration non-deductible expenditures of from $11,000 to $29,000 a year

which the Government properly included in the net worth computation. (Cf. R. 9 and 133.)

3. Equally without substance is the argument (Pet. 3, 11, 19-21) that the trial court erred in admitting a record of the taxes paid by petitioner in the years prior to 1945.

Evidence which incidentally establishes the commission of another wrongful act is admissible if relevant to establish the offense charged. *Wolcher v. United States*, 200 F. 2d 493, 497 (C.A. 9th). Since this was a net worth case the amount of income earned and taxes paid by petitioner in the years prior to the years involved in the indictment was obviously relevant to the establishment of his net worth at the starting point,[10] and the exhibit in question was introduced by the Government for that purpose because defense counsel would not concede the beginning figure. (R. 6-7.) A little later, however, the defense abandoned this position and did concede that the starting point net worth was $146,924.41. (R. 11-14.) The purpose for which the exhibit was originally admitted was clearly understood by defense counsel. (Cf. R. 25 and Tr. 391-393.) Since there was no issue before the jury as to the starting point, no instruction was either requested or given on the use to be made of the tax payment exhibit.

[10] The Government's witness was not talking about the starting point (see Pet. 8, 21) when he said that prior tax payments had no bearing on the net worth computation. (Tr. 391-393.)

Petitioner contends (Pet. 3-4, 11, 27-29) that several errors were committed in the prosecutor's closing argument to the jury and in the court's charge. Error in the argument is alleged (1) in the prosecutor's statement that the court allowed him to cross-examine two Government witnesses on the ground that they were not telling the truth; (2) in the statements that no witness denied petitioner's receipt of the $50 payments, and that petitioner was hiding behind the skirts of his wife; and (3) in the statement that petitioner could not escape by putting the blame on his bookkeepers. Error in the court's charge is alleged (1) in the statement that the testimony of petitioner's wife that she had never seen him receive the $50 payments was negative and weak testimony as compared with positive testimony to the contrary; and (2) in refusal to give a requested instruction that there is a legal difference between a taxpayer who makes out his own return and one whose return is made out by another. We submit that each of these isolated passages, with the possible but harmless exception of the court's comment on the weakness of Mrs. Mitchell's testimony, is proper in its context.

In the first place no objection was raised in the trial court to any portion of the prosecutor's argument. Nor was the attention of the trial judge directed to either of the objections now made to the charge. When the judge had finished the

charge, defense counsel requested and was granted one addition, immaterial here. Thereafter defense counsel said, "Your Honor, we have nothing else. That is the only point. No exceptions." (R. 77-78.) Only a very grave error could, therefore, be noted by the Court of Appeals. *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 408-412.

The passages complained of in the prosecutor's closing argument were all intended to answer arguments which had just been made by the defense. Defense counsel had called the jury's attention to the contradictory testimony of the two McIntoshes, both Government witnesses, as to the $50 payments (Tr. 749-750, 767-768); he had to a certain extent misrepresented the testimony of petitioner's wife on the same subject (Tr. 751-752); and he had relied heavily on testimony as to mistakes by petitioner's bookkeepers and accountants (Tr. 763-766, 775-777). The prosecutor's argument in reply, considered as a whole (R. 57-65), was not unfair. See *United States* v. *Socony-Vacuum Oil Co.*, *supra*, pp. 237-243.

Petitioner's complaints concerning the trial court's instructions are equally unworthy of further review. While it would probably have been better if the court had refrained from commenting on the quality of Mrs. Mitchell's testimony (see II Wigmore, *Evidence* (3d ed. 1940), Sec. 664), in the absence of objection at the trial this cannot have been such grave error as to require reversal.

This is particularly true in view of the obviously interested character of Mrs. Mitchell's testimony (Tr. 580-594) and in view of the court's express instruction to the jury, at the outset of the charge and immediately after the questioned passage, that they should disregard any expressions of opinion from him and make up their own minds on the facts (R. 65-67, 73). Finally, petitioner's refused instruction (R. 65) was incorrect in postulating a "legal difference" between a taxpayer who has someone else make out his returns and one who makes out his own. The jury were plainly told that petitioner could not be held criminally responsible for inaccuracies in his returns, but must be found to have wilfully filed false returns. (R. 70, 72.)[11]

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[11] Petitioner also urges (Pet. 3, 11, 21-26) that the Court of Appeals has erroneously interpreted Rule 52, *supra*, p. 4, the "harmless error" and "plain error" rule. But the opinion of the court below clearly shows a proper understanding of "plain error" (R. 128-129), and there was no occasion for invocation of "harmless error" since, as has been shown, the rulings to which a proper objection was made in the trial court were not erroneous.

CONCLUSION

The decision of the Court of Appeals is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 622.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The purpose of this brief is to comment on the Government's Brief in Opposition, and to supply additional authorities.

The opposition presents four points (B. Opp. 11, 15, 17, 18) which correspond with petitioner's first, second, third, and sixth Reasons for Granting the Writ (Pet. 11, 16, 19, 27); and this reply is limited to such points.

ARGUMENT.

(1) Respecting the burden of producing evidence in Net Worth prosecutions, with particular reference to the Government's failure to make proof of petitioner's gifts, inheritances and loans during the indictment period (Pet. 11-16; B. Opp. 11-15), petitioner notes that the conflict between the Courts of Appeal has been pointed up by the latest decision, *Ford* v. *U. S.*, (C. A. 5) 210 F. 2d 313, wherein it is stated that, in Net Worth prosecutions, "The Government * * * has the further burden * * * of proving that there were no gifts, devices (*sic*), or other nontaxable income * * *," l. c. 315. Contrast this with the following from Government's Brief: "In this case, it is true, the Government did not exclude the possibility that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence" (B. Opp. 12). Conceding again that the Government's position is supported by the controlling rule in the Eighth Circuit as announced in *Schuermann* v. *U. S.*, 174 F. 2d 397, the *Ford* decision, *supra*, supplements petitioner's demonstration in cases cited (Pet. 12-13) that there is a continuing and recurring conflict which should be settled by this Court. See *Remmer* v. *U. S.*, No. 304, 346 U. S. 884, decided March 8, 1954, on other grounds.

Numerous cases cited by the Government (B. Opp. 12-13) are not in point since they relate to *degrees* of proof rather than the *burden* of proof, the latter being the issue raised by petitioner. The Government's Net Worth proof in the cause at bar contains no scintilla of evidence relating to petitioner's gifts and inheritances, so decisions

as to what constitutes "substantial" evidence can have no application. The inescapable question is which party has the burden of producing evidence of non-taxable receipts. The Government's citation of cases, in seeking to avoid the burden of proof (B. Opp. 14), reveals the thin analogies upon which it relies. See *U. S.* v. *Fleischman*, 339 U. S. 349, including dissenting opinions; compare Pet. 13-15. It is apparent that a serious issue has been raised for this Court's consideration.

In arguing that the Court should let the failure of proof in this case slip by, because not objected to at trial, the Government omits to consider petitioner's arguments on this issue (Pet. 15-16). The Government implies that petitioner admitted at trial that the Government's Net Worth Statement correctly presented petitioner's income during 1945 through 1948, and states that he is now maintaining that there was "no failure at all" in reporting income (B. Opp. 12), neither of which suggestions can find support in the Record or Petition. Petitioner has always conceded certain items negligently omitted from his returns (R. 44). His position here, as below, is that the failure of proof as to gifts, inheritances, and loans is a matter of law rather than an issue for the jury.

The Government further seeks to defer this Court's resolution of the conflict between the Circuits by stating, without Record citation, that there was in this case "an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth" (B. Opp. 13). In fairness to petitioner, this unwarranted comment, completely outside the Record, should bear the test of a new trial.

Again, in seeking to distinguish the leading cases favorable to petitioner, the Government states, "In each of

these cases there was an incomplete investigation * * *" (B. Opp. 15). This is no distinction; so far as appears from the present Record, there was no investigation of petitioner's gifts or inheritances. The instant case is a most appropriate one for determining whether, before obtaining an income tax conviction, the Government has the obligation to make such investigation and proof.

(2) Respecting the erroneous admission into evidence and instruction given on petitioner's financial statements containing some $150,000 of market value appreciation which should not have been treated as income (Pet. 6-8, 16-19), the Government continues to advocate the patent error that such inflated market-value statements can be used to "corroborate" a Net Worth Statement, even though, in the Government's language, a net worth computation, "in order to present a true picture of petitioner's income, must necessarily value his assets at cost" (B. Opp. 16). Unless corrected here, the Government has served notice that it will continue to misuse this type of testimony.

The Government's Brief further erroneously states that the acquittal for 1949 and 1950 shows that the financial statements were not prejudicial (B. Opp. 16), despite the obvious explanation that the acquittal was based on the testimony of petitioner's accountant (R. 52-55), unrelated to said financial statements. The Government seeks to link the instructions regarding the financial statements to its own Net Worth Statement rather than to petitioner's financial statements (B. Opp. 16), but a reading of the instructions (R. 71-2) rebuts the suggestion. Finally, the Government claims, "The calculation upon which petitioner now relies (Pet. 18) is fallacious * * *" (B. Opp. 16); but the questioned method of calculation is not petitioner's but the trial court's (R. 71-2). If alleged non-deductible expenditures are to be taken into consid-

eration in such a calculation, as suggested by the Government, then various deductions should be considered (R. 9), as well as the admittedly unreported income which was explained at trial (R. 52-55, 44) or which the jury found to have been innocently omitted. No precise calculation of income can be made from said financial statements, because market values cannot be reduced to cost on each item and because year-end figures are not available, as required for such a calculation (R. 25); but this does not detract from petitioner's unchallenged demonstration that more than $150,000 of unrealized market value appreciation was erroneously treated as income in this prosecution, and that petitioner was held accountable for said sum as though it were income, to his grave prejudice (Pet. 6-8, 16-19).

(3) Respecting the erroneous admission into evidence of petitioner's tax payments for prior years (Pet. 19-21), the Government states, without explanation, that such payments were "obviously relevant to the establishment of (petitioner's) net worth at the starting point" (B. Opp. 17), although construction of a financial statement out of moneys expended for taxes in prior years remains a baffling procedure. This sleight-of-hand cannot be passed off as "obvious." Nor can the Government properly interpret the testimony of its witness, wherein he stated that such payments had no bearing on the Net Worth Statement (Tr. 391-3), as not including the beginning net worth (B. Opp. 17). This testimony will bear no such strained limitation.

(4) Respecting the serious errors in the prosecutor's closing argument and the trial court's charge (Pet. 9-10, 27-29), extensive additional comment is unnecessary. The Government commendably concedes doubts and probable error concerning the trial court's instruction on Mrs.

Mitchell's alleged "negative" testimony as being "weak testimony as compared with the positive testimony" that disputed payments were actually made (B. Opp. 18, 19; R. 73). The instruction was not merely an expression of opinion on the facts (B. Opp. 20), but was a statement of law. "That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong" (R. 73). This erroneous legal instruction must have been considered controlling, especially in view of the additional error in argument tending to convince the jury that the court had ruled that the disputed payments were made (R. 64-65).

It should be further noted that no substantial defense is made regarding the specific errors in argument cited by petitioner, the Government relying on a premise, which is seriously disputed, that "The prosecutor's argument * * * considered as a whole (R. 57-65), was not unfair" (B. Opp. 19). No similar attempted defense is made regarding the trial court's instructions (R. 65-77), probably because the general tenor of argument, advocacy, and unbalanced presentation cannot be readily defended. *Spalitto* v. *U. S.*, (C. A. 8) 39 F. 2d 782, 788.

CONCLUSION.

For the foregoing additional reasons, and without waiver of matters presented in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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